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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SIMON & SCHUSTER, INC.,

Petitioner,

—v.—

MEMBERS OF THE NEW YORK STATE CRIME VICTIMS BOARD, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, NEW YORK CIVIL LIBERTIES UNION, AND PEN AMERICAN CENTER, IN SUPPORT OF PETITIONER

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INTEREST OF AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan membership organization with over 275,000 members, dedicated to defending the principles of individual liberty embodied in the Constitution. The New York Civil Liberties Union is its statewide affiliate. For over seventy years, the ACLU has been particularly associated with free speech issues and has participated in thousands of cases involving the First Amendment at every level of the state and federal courts.

PEN American Center (PEN) is an organization of 2,400 novelists, poets, essayists, translators, playwrights, and editors. As part of international PEN, it and its affiliated organizations are chartered to defend free and open communication within all nations and across national boundaries. American PEN has taken a leading role in attacking restrictive laws, rules, regulations and practices that censor, curb or limit freedom of speech or expression in the nation.

It is *amici's* position that the law at issue here is fundamentally out of step with the values and principles underlying our First Amendment traditions and jurisprudence, and for that reason *amici* support the effort of petitioner to have the law declared unconstitutional. In the instant matter, author Nicholas Pileggi presents an important picture of the criminal underworld in his book *Wiseguy*. To obtain much of the material for the book, Pileggi conducted extensive interviews with a former underworld figure, Henry Hill, who would not have provided the information without compensation. And without Henry Hill's story, the book could not have been written and published. If the Crime Victim's Board is

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

successful in its effort to hold the publisher, Simon & Schuster, liable for monies it has already paid, it is much less likely that inside stories such as *Wiseguy* will be published in the future.[2] In such a case, all society is the loser.

STATEMENT OF THE CASE

The Statutory Background

New York Executive Law §632-a is directed solely at monies earned by the exercise of the rights of free speech and free press. It applies to all contracts for a book, movie, magazine article, or play written by a person accused of a crime with respect to the "reenactment" of the crime or to the accused's thoughts, feelings, opinions, or emotions regarding a crime. A person who confesses or "voluntarily admits" to a crime is covered by the law, even if he or she is never convicted of the crime, or could not be convicted, because of the statute of limitations or for any other reason.

Only the proceeds of a book, article, movie or play are covered by the law. If the criminal obtains money

[2] The Board is also attempting to apply the law to at least two other books of great societal interest: (1) *Stranger in Two Worlds*, written by Jean Harris, and (2) *Trading Secrets*, by R. Foster Winans. The Jean Harris book is a valuable study of prison life and its effect upon women inmates. The book received excellent reviews for its careful and well-written examination of the brutalities of institutional life. Mr. Winans, who was and is a professional writer, recounted his involvement in a Wall Street trading scandal and his insights into the corporate culture and inner workings of the financial markets. His book also received many positive reviews. Yet the Crime Victims Board is attempting in both instances to obtain all royalties earned by the authors. *See Children of Bedford Inc. v. Petromelis*, 541 N.Y.S.2d 894 (Sup.Ct. N.Y.Cty. 1989), *aff'd*, 556 N.Y.2d 483 (1st Dep't 1990), *argued* (N.Y.Ct.App. March 26, 1991); and *St. Martins' Press, Inc v. Zweibel*, Index No. 89/12273 (Sup.Ct. N.Y.Co. Feb. 1, 1990).

from any other source -- inheritance, investments, exploitation of any skill acquired from criminal activity (such as learning how to break a lock or break into a computer data bank) -- the law does not attempt to reach it. The law is triggered only to reach the proceeds from a First Amendment activity.

The Legislative History

The "Son-of-Sam" law was inspired by the fear that the notorious criminal who operated under that name in the late 1970's would reap the benefits of the publicity surrounding his actions and would make a fortune from selling his story. The legislative bill jacket for the law states its justification as follows:

> Currently, a person may commit a crime causing much damage and personal injury, and then gain substantial financial benefits related to resulting publicity. This bill will insure that monies received by the criminal under such circumstances shall first be made available to recompense the victims of that crime for their loss and suffering.[3]

The first case interpreting the law noted that the law was "conceived in haste, written in haste, and declared under the cry of the public for the legislature to exact retribution . . . ." *In re Johnsen* (*Berkowitz*), 430 N.Y.2d 904, 906 (Sup.Ct. Kings Co. 1979). The law passed in the summer of 1977, as part of the New York Crime Victims Statute set forth in Article 22 of the Executive Law, just before David Berkowitz (alias "Son-of-Sam") was apprehended. It was signed by Governor Carey into law on the day after he was arrested. A later court decision noted that the Division of the Budget had

[3] *See* Bill memorandum, A 9019, set forth in Appellant's Appendix, *Children of Bedford v. Petrolmelis*, *supra*, n.2.

advised that the law was "terribly drafted," and should be vetoed, *Barrett v. Wojtowicz*, 414 N.Y.S.2d 350, 355 (2d Dep't 1979).

INTRODUCTION AND SUMMARY OF ARGUMENT

It must be emphasized at the outset that *amici* are fully in accord with the purpose behind the Crime Victims Law: victims of crime should be compensated by those who injured them, and the state should do more to help them obtain financial assistance. But what the state cannot do is to try to achieve this laudatory aim by concentrating only on one type of income, namely money obtained by writing books or movies. Not only is this approach terribly underinclusive -- how many criminals are there who are capable of writing a publishable work? -- but it violates key constitutional principles of First Amendment jurisprudence, as explained below.

The law at issue here, §632-a of New York's Executive Law, is unconstitutional under the First Amendment for several reasons. It imposes differential financial burdens on the First Amendment activity and *only* the First Amendment activity of criminal authors, and it draws distinctions based upon the *content* of the material involved and the identity of the writer. These classifications imposed by the statute can only be upheld if the statute is narrowly tailored in the pursuit of a compelling government interest. No such showing can be made here. Specifically, the statute bears only a tenuous relationship to its stated purpose of compensating crime victims. It is underinclusive because it does not reach any of the criminal's assets beyond those generated by First Amendment activity. It is overinclusive because it reaches First Amendment profits even if the book's success does not depend on the author's criminal notoriety. And, it is manifestly ineffective since it has provided compensation to only a handful of victims since the stat-

ute's enactment in 1977. Finally, writing a book cannot [illegible] be regarded as a fruit of the crime, even if the book concerns the crime, without distorting or ignoring commonly accepted legal doctrines.

ARGUMENT

I. EXECUTIVE LAW §632-A MUST BE SUBJECTED TO STRICT SCRUTINY BECAUSE IT PLACES A SEVERE AND CONTENT-BASED RESTRICTION ON THE EXERCISE OF FIRST AMENDMENT RIGHTS

A. Introduction

At the outset we must note that, while the effort to compensate crime victims is commendable, the method chosen by New York State under this law is unacceptable under the First Amendment.

We start with two obvious propositions that are not in dispute: (1) the government has broad power to punish criminals and compensate victims; and (2) the government has broad power to recover from a criminal the actual fruits, instrumentalities or proceeds from a crime.

Both of these aims reflect important, even compelling government interests. The state certainly can impose heavy financial burdens upon a convicted criminal -- in addition to imprisonment -- through fines or forfeitures. Indeed, the state has the power to punish and compensate in the same proceeding. For example, the federal government recently passed a law providing for an "order of restitution" to be entered at the same time sentence is imposed upon a convicted criminal, providing that the defendant must pay the victim of the crime compensatory damages. *See* 18 U.S.C. §3579. The order is enforceable to the same extent as a civil judgment. Thus, it can be enforced against all the assets of the defendant, from whatever source derived, for as

long as a judgment is enforceable under local law.

In addition, the state provides an elaborate system for compensating all victims of any tort -- whether or not it constitutes a crime -- through the normal civil tort suit. Upon securing a judgment, a plaintiff can reach virtually all assets of the tortfeasor. However, there are statutes of limitations that require such actions to be brought within a set period of time.

Finally, the government has broad power to recover the proceeds or fruits of a crime. Both the state and federal governments have provided comprehensive mechanisms for forfeiting such proceeds under the federal RICO statute, 18 U.S.C. §1961 *et seq.*, and under the recently enacted Article 13A of the New York Civil Practice Law and Rules (CPLR). But when a criminal writes a book, even about his crime, that book is, in no sense, the "fruit" of the crime.[4] The book is the fruit of the criminal's lawful, literary and artistic efforts. He or she may be famous because of the crime, but to consider the book the "proceeds" of the crime is to stretch the meaning of that word beyond recognition.[5]

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[4] The "proceeds of a crime" are defined in New York CPLR 1310 as "any property obtained *through the commission of a felony crime*" defined in the section (emphasis added). Under that definition, book royalties could not conceivably be covered.

[5] We explain below why the royalties from a book written by a criminal about the crime cannot be considered the "fruits" of the crime. Among other reasons cited below, one has only to look at the numerous books written by former Presidents and government officials after they leave office, which often represent the most important financial component of their retirement income. Under the federal copyright law, 17 U.S.C. §105, copyright "is not available for any work of the United States Government." If the later literary efforts of former government officials were considered the "fruits" or "proceeds" of their government work, since they became famous as a result of being President or Secretary of State, they could not obtain copyright in their work. But every court that has passed on the matter, including this (continued...)

B. By Depriving Authors Of Any Profits For A Five Year Period, The Challenged Statute Places A Severe Burden On The Exercise Of First Amendment Rights

The question presented here is not whether the imposition of financial burdens on criminals, the compensation of victims, and the forfeiture of criminal proceeds are important or even compelling state interests. The question is whether the state can select one source of income alone -- First Amendment generated income -- and create an extraordinary mechanism for compensating victims only when such income is involved.

Because the Son-of-Sam law singles out First Amendment income, the Second Circuit held that strict scrutiny applies. We agree. As the Second Circuit explained:

> We think that the District Court erred in testing section 632-a under the standards established in *United States v. O'Brien* [391 U.S. 367 (1968)] . . . despite the Supreme Court's requirement "that the governmental interest in question be unconnected to expression in order to come under *O'Brien*'s less demanding rule. *Texas v. Johnson*, 109 S.Ct. 2533, 2541 (1989).
>
> It cannot be said that the governmental interest advanced by section 632-a bears no relation to expression, since the statute burdens directly the speech of those who wish to tell (and sell) the stories of their crimes.

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[5] (...continued)
Court, considers the later literary efforts of such officials to be a separate, individual literary act unrelated to the government service that generated the book and the public's interest in the author. *See Harper & Row, Publishers, Inc. v. The Nation*, 471 U.S. 539 (1985).

> The possibility of a payday five years or more down the road, depending on claims against the escrow fund, can hardly be seen as providing an adequate financial incentive. Without a financial incentive to relate their criminal activities, most would-be storytellers will decline to speak or write.

Simon & Schuster, Inc. v. Fischetti, 916 F.2d 777, 781 (2d Cir. 1990).

In applying strict scrutiny, the Second Circuit relied in part upon this Court's decision in *Meyer v. Grant*, 486 U.S. 414 (1988), which struck down a Colorado state law that prohibited paying persons to circulate petitions for ballot initiatives. The law put no restriction on the number of people who might circulate such petitions or the manner in which they might be circulated. It simply prohibited petition circulators from being paid for that activity. Nevertheless, this Court had no difficulty in finding that the law was subject to strict scrutiny.

> The refusal to permit appellees to pay petition circulators restricts political expression in two ways: First, it limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot . . . .

Id. at 422-23 (footnote omitted). In words that are equally relevant here, the Court further observed: "We can take judicial notice of the fact that it is often more difficult to get people to work without compensation than it is to get them to work for pay." *Id.* at 423, *quoting Urevich v. Woodard*, 667 P.2d 760, 763 (Colo. 1983). *See also Riley v. National Federation of the Blind in North Carolina*, 487 U.S. 781 (1988)(North Carolina law that restricted the fees that a professional fundraiser could charge for collecting money for charity unconstitutional).

Exactly the same principle is involved in this case. Simon & Schuster has a First Amendment right to "advocate [its] cause," that is, to publish a book about a professional criminal, Henry Hill. Restricting the right to be paid for doing so inevitably inhibits a writer or publisher from deciding to write or publish a book. It also inhibits publishers from signing up similar books in the future.[6] Under the reasoning of *Meyer*, strict scrutiny must apply. Accordingly, the statute cannot be sustained unless it is narrowly tailored in the pursuit of a compelling interest.

C. The Law Imposes Differential Financial Burdens On First Amendment Generated Income

The law at issue involves discrimination against First Amendment activities and First Amendment activities only. No one doubts that the state could pass a wide variety of laws benefitting victims and allowing them to recover money from their criminal attackers. It could certainly allow victims to obtain money secured from all sources, including funds obtained by writing books. But well-established constitutional doctrine forbids the state from focusing on income derived *only* from First Amendment activities and providing for remedies dealing with that activity alone. This would be considered a discriminatory financial burden on expressive activities prohibited by the First Amendment.

The point is illustrated by recent decisions from this Court striking down laws that discriminate in the imposi-

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[6] Even if the Court did not take judicial notice of this fact, the affidavits from other publishers submitted in this matter show that such an inhibition on expressive activity is indeed occurring as a result of the Son-of-Sam law. JA13-24, 34-47.

tion of taxes against First Amendment actors. It is undisputed that the government may tax the income or property of newspapers, book publishers or movie companies. Their status as First Amendment actors does not immunize them *from financial burdens placed on all others similarly situated*. But as broad as its taxing power may be, the state cannot tax activities in which only First Amendment actors engage.

Thus, this Court wrote in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987): "Our cases clearly establish that a discriminatory tax on the press burdens rights protected by the First Amendment." No matter how small the financial burden may be, legislation "singling out the press as a whole or targeting individual members of the press . . . poses a particular danger of abuse by the State" and cannot be upheld under the First Amendment. *Id.* at 1727. *See also Texas Monthly, Inc. v. Bullock*, ___ U.S. ___, 109 S.Ct. 890 (1989)(sales tax exemption for religious magazines violates the Establishment Clause).

Nor may the state impose a discriminatory financial burden only on activities engaged in by the press. For example, in *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), the Court struck down a use tax on newsprint costs over $100,000. As this Court observed in *Minneapolis Star*, "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to the suppression of expression, and such a goal is presumptively unconstitutional." *Id.* at 585.

That principle was recently reaffirmed in *Leathers v. Medlock*, No. 90-29 (April 16, 1991). After reviewing its decisions in *Arkansas Writers' Project* and *Minneapolis Star*, the Court wrote:

> These cases demonstrate that differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints. Absent a compelling justification, the government may not exercise its taxing power to single out the press. The press plays a unique role as a check on government abuse, and a tax limited to the press raises concerns about censorship of critical information. A tax is also suspect if it targets a small group of speakers. Again, the fear is censorship of particular ideas or viewpoints. Finally, for reasons that are obvious, a tax will trigger heightened scrutiny under the First Amendment if it discriminates on the basis of the content of taxpayer speech.

Leathers v. Medlock, slip op. at 6-7 (citations omitted).

Section 632-a suffers all of these defects. There is no doubt that a differential "burden" is placed upon First Amendment activities. The law "singles out the press" and engages in "differential treatment" of speech related activities: specifically, a state agency is empowered to attach certain assets for a five year period and extend the normal statute of limitations indefinitely only with respect to book and movie generated income. The law does not attempt to reach other assets of a criminal -- stocks, bonds, cash -- or to reach other income that a criminal may later make as a result of exploiting the skills he learned as a criminal (for example, the wages of a burglar who becomes a locksmith or of a bank robber who becomes an adviser to companies on security). It reaches only income that a criminal makes as an author. Again, such a differential burden is unconstitutional, unless it is narrowly tailored in the pursuit of a compelling interest.

D. The Law Is Speaker- And Content-Based

Any law that differentiates between one type of speaker and another is presumptively unconstitutional. In *First National Bank v. Bellotti*, 435 U.S. 765, 784-85 (1979), a law barring business corporations from making contributions for speech on certain subjects (which this Court interpreted as a direct restriction on speech itself) was held invalid. This Court noted: "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak *and the speakers who may address a public issue*" (emphasis added). *See also FCC v. League of Women Voters*, 468 U.S. 364, 384 (1984)(among "the purest examples of a 'law . . . abridging the freedom of speech, or of the press'. . . [is a] regulation that denies one group of persons the right to address a selected audience on 'controversial issues of public policy'. . . .").

Again, that is precisely what §632-a does. It singles out certain speakers for special disadvantages. It is only when a *criminal* writes about the crime that the prohibitions in §632-a come into operation. Any other person may write the same book and keep the proceeds. Strict scrutiny must be applied to such a differentiation.

In addition, the law is triggered only if the subject matter of the book is the "reenactment" of the crime or a description of the criminal author's thoughts, opinions, feelings or emotions about the crime. In other words, the law is invoked only if certain subjects are discussed or certain topics covered. Such a distinction runs afoul of the most fundamental principles of the First Amendment. *See Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 537 (1980)(citation omitted): "As a general matter, 'the First Amendment means that the government has no power to restrict expression because of its message, its ideas, its subject matter or its content.'" *See also Carey v. Brown*, 447 U.S. 455, 461-64 (1980)(differential treatment of residential picketing in-

valid under strict scrutiny since applicability of provision "dependent solely on the nature of the message being conveyed"); *Perry Ed. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 45 (1983)("[f]or the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975)("even a traffic regulation cannot discriminate on the basis of content").

The term "content" has a broad meaning under the law. It means not only that the state cannot differentiate in terms of the viewpoint being offered by the speaker, but also that it cannot differentiate in terms of the subject matter being discussed, regardless of the speaker's viewpoint. Thus, in both *Carey* and *Police Department v. Mosley*, 408 U.S. 92 (1972), labor picketing was allowed in front of certain buildings, but other demonstrations were not. The defect in the law was the fact that the only subject allowed to be aired at that place related to labor disputes, regardless of the point of view presented. That was sufficient to make the regulation a prohibited content-based law. In *FCC v. League of Women Voters*, 468 U.S. 364, a federal law prohibited noncommercial educational broadcasting stations receiving funds from the Corporation for Public Broadcasting from engaging in "editorializing." This Court held that the law was an invalid regulation based on the "content of the suppressed speech," since it prohibited a broad *category* of speech, regardless of the particular point of view expressed. *See also Boos v. Barry*, 485 U.S. 312 (1988).

Similarly, here, the only subject matter that triggers application of the law is a discussion of the crime. If the criminal author discusses his or her life in prison or before the crime, the law does not apply. This differential treatment of subject matter or category or content is precisely what this Court has condemned, absent a com-

pelling state reason, under the cases noted above.

Finally, the legislative background of the law indicates that its purpose was precisely to keep criminals from telling their story, *i.e.*, to suppress their expression, a goal which is presumptively unconstitutional. Whatever the validity of more general laws benefitting victims, the First Amendment prohibits the state from imposing a discriminatory financial burden on criminals for the very purpose of prohibiting them or inhibiting them from telling their stories.

When the state passes a law imposing financial burdens solely on criminals who write about their crime, the only conclusion that one can draw is that the state is seeking to suppress that type of expression. It does not want criminals writing about crime and seeks to discourage them from doing so by denying them any immediate financial reward if they do so. Indeed, when the state seeks to justify the law by saying that it is trying to keep a criminal from "benefitting" from his crime, it is implicitly admitting that it has precisely that purpose in mind. The inescapable conclusion from this type of differentiation is that the state is indeed attempting to suppress a certain type of expression (by imposing a particular burden on that message but not on others) written by a particular speaker (the criminal author).

The First Amendment prohibits the state from imposing that type of burden or acting with that purpose in mind. The state is simply disqualified from dictating the subjects that its citizens may discuss or who may discuss them. *See First National Bank v. Bellotti*, 435 U.S. 765.

II. RESPONDENTS CANNOT MEET THE STRICT SCRUTINY TEST IN THIS CASE

The "strict scrutiny" test requires that the state not only *argue* but *prove* that its regulation "is necessary to serve a compelling interest and is narrowly drawn to achieve that end." *Arkansas Writers' Project*, 481 U.S. at 231. This Court noted in *Meyer v. Grant*, 486 U.S. at 1894: "[T]he State has *failed to demonstrate* that *it is necessary* to burden appellees' ability to communicate their message in order to meet its concerns" (emphasis added). In no way can the state offer a "compelling" reason for the law at issue here, nor can it show that the means chosen were "narrowly tailored" to achieve that end, nor can it "demonstrate" that "it is necessary" to burden a criminal author's ability to communicate in order to satisfy its interests in this case.

The requirement of showing a narrowly tailored as well as compelling reason applies both to the fact of *regulation* and the *distinctions* made by the law with respect to the First Amendment activity. *See Arkansas Writers' Project*, 481 U.S. at 231 (state must justify not taxation of the press generally, but differential taxation of the press). Thus, in this case, the state must show more than that the Son-of-Sam law could be invoked to compensate some victims of crime. It must show a compelling reason why it was necessary to limit the attachment and extension-of-limitations provisions in the law only to First Amendment generated income and only *from the publishing of books reenacting the crime*, and that the method it chose was "narrowly tailored" to compensate victims while not unnecessarily restricting First Amendment activities.

In sum, the state has the burden, and it is a "heavy" one, *id.*, of justifying its asserted reasons for focusing only on First Amendment generated income by pointing to concrete legislative facts to support the differentiation. Unlike the analysis employed under the rational relation-

ship test, the state cannot hypothesize some later justification and try to persuade a court to accept its *ad hoc* rationalization. *See, e.g., Meyer v. Grant*, 486 U.S. at 426, "No evidence has been offered to support that *speculation* [of the attorney general to support the law]" (emphasis added). Instead, the reasons offered are subject to the most careful scrutiny to see if there are real facts to support them, and if the reasons pass constitutional muster.

Based on this standard, the state cannot justify the present law. None of the reasons suggested by the Board meet the stringent test noted above.

A. The Desire To Compensate Victims

The general desire to assist victims is not enough to justify the law. If that were its only aim, the law is terribly inadequate and underinclusive. According to a recent report of the Board, the law has been invoked less than ten times in the eleven years of its operation, an average of less than one person helped per year. (The Board has attempted to apply the law in another five or six cases, including this case and the litigations described above).

By contrast, the total number of victims of crime in New York State is in the hundreds of thousands, if not the millions. In 1987, there were 53,733 sentences imposed after a felony conviction in New York State Caseload Activity Report, 1987, Office of Court Administration, and over the past ten years the rate has been steadily increasing. Assuming that there were an equal number of victims of such crimes for each person sentenced -- an assumption that in fact underestimates the number of victims, since criminals often have multiple victims -- the assistance given crime victims generally by the Son-of-Sam law is ludicrously inadequate, averaging one in 50,000. This imbalance between the universe of victims in the state and the narrow focus and reach of the law is

another indication that its true aim was not to compensate victims, but to suppress expressive activity by criminals.

B. The Desire To Compensate Victims From Assets Subsequently Obtained From Criminals

Another argument often asserted is that criminals are generally judgment proof and that it is a waste of time and money to bring a regular tort action immediately after the crime and collect a judgment, which will then be unenforceable. The state argues that victims rarely have the funds to bring a fruitless action on their own and need the assistance of the state to freeze the criminal author's assets. Subsequently acquired book and movie moneys may be a ready source of funds which the state can attach for the benefit of the victim.

To uphold the law on that basis, the state must show *in fact* that the current civil tort system for compensating tort victims is inadequate, and that there is a real problem of criminals obtaining large sums of money for selling their stories subsequently while their victims go uncompensated. Such facts must be presented to a legislative body and must at least be articulated to a court later examining the law.

There is absolutely no evidence to show that any of these hypotheses are true. Any victim of a tort may take advantage of the normal civil procedures for obtaining relief, *i.e.*, by bringing an action for wrongful death, assault, negligence and the like and securing a judgment against all the assets of the criminal tortfeasor, including the earnings from a book.

Indeed, in a case discussed in one of the affidavits in the record below, that is precisely what happened with respect to the earnings from a book entitled *In the Belly of the Beast*, written by John Henry Abbott. After writing that book (which did not discuss any specific crime)

and being released from prison, Abbott killed New York artist Richard Adan. Adan's estate brought an action for wrongful death and, prior to the civil trial, attached all of Abbott's royalties due with respect to that book under the normal content-neutral attachment provisions of the CPLR, which apply to all assets of a potential judgment-debtor. Thereafter, upon securing a judgment, the estate levied upon those proceeds.[7] Thus, the normal attachment-and-levy procedures of the CPLR were more than adequate to the task of assisting crime victims to obtain compensation, even against criminal authors.

In addition, the state must show that there is something unique about later acquired assets from books and movies that are different from later acquired assets in any other area, *i.e.*, money later inherited by a criminal or earned by a criminal as a locksmith, security expert, or computer-data thief based on skills developed as a criminal, or merely his regular wages earned in any other way. Furthermore, the state must show that the need for seizing such assets exists *only when the criminal author writes about the crime*.

There is absolutely no proof that any one of these hypotheses were true, either before the law was passed or since then. If the theory is that later acquired money by a criminal should be made available to victims by a special attachment procedure aided by a state agency even beyond the normal statute of limitations period, then why not apply it to *all later acquired* assets of a criminal? Surely the victim needs the funds just as much regardless of how the criminal may earn them later. What is unique about book and movie money in this regard? And what is unique about book and movie money *dealing only with the crime* that requires that only those assets be attached?

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[7] *See* Affidavit of Gerald Hollingsworth, ¶¶7-10, JA35.

Once again, the only possible conclusion one can reach is that the legislature did not want books published that were written by criminals about their crimes. It sought to discourage them from doing so by depriving them of compensation, if they did write and publish a book. Under the First Amendment, that is not an acceptable purpose for a law.

C. The Desire To Keep Criminals From Profiting From Their Crimes

Another reason offered for the law is the argument that criminals should not profit from their crime and a book which depicts the crime is somehow the "fruit" of that crime. While a legislator may vote for the law on that basis, a court simply cannot accept that reason as a justification for a law treading on First Amendment rights without the high evidentiary showing required under the First Amendment. There are at least four reasons why the fruits of literary activities cannot be considered the "fruits" of a crime.

1. Literary Royalties Do Not Flow Directly And Proximately From The Commission Of The Crime

It is true that New York State has ruled, as have all common law jurisdictions, that "no one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime," *Riggs v. Palmer*, 115 N.Y. 506, 511 (1889). Thus, an individual who kills someone may not inherit from the estate of the person slain, nor collect from an insurance policy in which he may be named as a beneficiary. *In re Loud's Estate*, 334 N.Y.S.2d 969 (Surr.Ct. Kings Cty. 1972).

But in those situations the economic benefit flows directly from the illegal act, with no intervening events contributing to the gain. When a criminal steals a car or

robs a bank, the proceeds come to him directly from the illegal act. When he kills a testator and inherits from the will, nothing more needs to be done before the money goes to him. In that sense the proceeds are a direct product of the killing. But in no sense is a book on crime the "fruit" or "proceeds" of that crime under this analysis.

A book is the lawful fruit of the author's literary efforts, where a person sits down and engages in a creative activity -- writing -- which is condoned and even praised by society in every other context and is specifically protected by the First Amendment. Since the proceeds flow from this later act and not from the criminal activities that are described in the work, neither the automatic forfeiture provisions of state or federal law nor the common law rule applies.

2. The Writing Of The Book Is An Intervening Act That Breaks The Chain Of Causation From The Criminal Act That Is Its Subject Matter

Viewed from another perspective, the law in question seeks to obtain the proceeds from the *lawful writing by* the criminal, not from *the criminal acts of* the perpetrator. If a criminal commits an offense, the victim may press charges and sue him and, as explained above, the normal tort procedures are available. But only when he or she writes a book, and not for any other activity, are the extraordinary procedures now under question invoked.

Thus, the law operates only upon the *writing* phase of the criminal author's activity. But it is impossible to consider the lawful act of writing as an activity that can trigger the invocation of the criminal justice mechanism of a state. It is simply not an activity that can be condemned on its own or sanctioned through fine, attachment or forfeiture. Of course, to the extent that such a

lawful activity generates income, the proceeds of that activity can be reached in the same evenhanded way that other noncriminal assets of the criminal may be obtained. However, it cannot be considered any phase of the criminal activity of the writer.[8]

3. The Reasoning Behind The Law Sweeps Too Broadly

To say that the fame created by a criminal act is the fruit of that act and therefore any economic benefit that flows from that fame is the fruit of the crime is to stretch the meaning of the term beyond any recognition. Each of our last five Presidents (Johnson, Nixon, Carter, Ford and Reagan) became famous because of their governmental service. Each wrote a book about their term of office, for which they were paid millions of dollars. Is the fame that they acquired as President the "fruit" of their service as President? If so, they cannot collect any royalties on their books since the Constitution prohibits a President from receiving any "emolument" from his service other than his salary. U.S. Constitution, Art. II, Sect. I. Cl. 5. Lee Iaccoca became famous because of his service as President of Chrysler, and wrote a best seller which earned millions of dollars. Does the company, or its shareholders, have a claim to his royalties since his fame was the "fruit" of his labors at Chrysler? If a judge wishes to write a book about his service, the state that he worked for does not own the copyright in the book, nor can it make any claim to his royalties even though the judge was placed in that position by the state and may have become famous and expert because the state so employed him.

We have always considered the reasons why a per-

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[8] To the contrary, writing can and should be regarded as "an intervening cause that broke the causal link" between the crime and the monies earned from book royalties. *Ross v. Oklahoma*, 487 U.S. 81, 96 (1988).

son became famous to be distinct from any activities he engages in to earn money once he achieved that status. Many persons became famous and develop expertise in an area in which they are employed (government service, entertainment, business, academia) and then write about those experiences. But we have never required such persons to surrender the proceeds of their books to the employer who put him in that position on the ground that the royalties are the "fruit" of the fame which his employment brought about. That is simply not the law. The writing of his book is considered an act independent of his service, employment and fame. A criminal has to pay for his crime through the punishment imposed, but the fact that he or she becomes famous as a result of the crime and that economic benefits result from that fame has never triggered any forfeiture theory -- until the Son-of-Sam law was passed.

4. The Law Reaches Books And Writings Not Within Its Aim

The alleged purpose of the law was to reach funds from "famous" criminals who, it was expected, could profit from their notoriety. As the sponsor said, a criminal may "gain substantial financial benefits related to resulting publicity" from his famous crimes. The law was designed, therefore, to prevent criminals from exploiting their criminal activity through profits gained by selling their crime stories. But the law in question does not reach merely "famous" crimes or exploitative criminals. It reaches all crimes that a person writes about, regardless of whether they made him famous or not.

Thus, if Herman Melville or Jack London committed some minor crimes in their youth and then made them the subject of books written twenty years later, the proceeds of those books are treated exactly the same as a "Son-of-Sam" exploitative work. If Malcolm X writes about his burglary of twenty years before, which generated no publicity of any kind when the events occurred,

he also is subject to the law. The law assumes that every book that discusses a crime must be the kind of exploitative work that the sponsors feared, even though there are literally thousands of books by criminals that add to our understanding of society and do not fall in that category.[9] Such a total divergence between the intent of the sponsors and the reach of the law reinforces the sense that the statute is, at once, too broad and too narrow.

D. The Need To Keep A Criminal From Profiting From The Exploitation Of His Or Her Crime While The Victims Of The Crime Are In Need of Compensation

Finally, the Second Circuit found another "compelling reason" to sustain the law beyond those offered by the state itself. The court held:

> Our society rightly deems it fundamentally unfair for a criminal to be paid for recounting the story of his or her crime while the victim remains uncompensated for financial loss occasioned by the crime.

916 F.2d at 782. The Second Circuit went on to note that the sort of law enacted by New York prevents a criminal's unjust enrichment, satisfies a victim's sense of justice and desire for retribution and increases the criminal's awareness of the crime.

> [T]he statute recognizes that the only way a criminal can profit directly from a specific crime involving a particular victim, other

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[9] There exists a fifty-three page bibliography of hundreds of writings by "criminals" and a discussion of their importance. *See* Franklin, *American Prisoners and Ex-Prisoners: Their Writings* (1982). Many if not most of the books would have been subject to the Son-of-Sam law if it had been in existence at the time.

> than by obtaining any proceeds of the crime itself, is by writing or talking about or re-enacting it. The statute also recognizes that, as a practical matter, the sole asset of most criminals is the right to tell the story of their crimes.

Id. at 783.

There are a number of observations that must be made about the Second Circuit's creative effort to save the law in question.

First, the court simply combined the three interests that were separately identified to justify the law into a single compound purpose. Thus, as discussed immediately above, the state previously identified three interests served by the law: (1) the need to compensate victims generally, (2) the need to compensate victims from after acquired assets of a criminal, and (3) the need to keep a criminal from profiting from the crime. The new combined or compound interest becomes the need-to-keep-criminals-from-profiting-from-exploitation-of-their-crimes-through-after-acquired-profits-from-their-books-while-the-victims-are-not-yet-compensated. But the fallacies that doomed each of the separate interests also doom the combined interest as well. The premise of the new compound interest is still that the criminal is profiting from the crime when he or she writes a book. If a book is not the fruit of the crime, then the entire premise of this new interest falls. For the reasons stated above, *amici* do not believe that a book is the fruit of the crime that made the author famous.

Second, as a matter of constitutional law, the creation of the "compound" interest referred to makes a mockery of the compelling state interest test. What the Second Circuit did below is to focus only on what the law covers and to see whether it could justify that purpose as compelling. Does the state have an interest in

having criminal authors pay to their victims, after-acquired royalties that discuss the crime? If that were the only focus, the answer might be "yes." But the minute the focus is broadened -- to ask what is not covered by the law -- then the defects of the law become apparent. If the question becomes: "Does the state have an interest in having criminal authors pay to their victims after-acquired royalties that discuss the crime *while permitting the criminal to write on any other subject without penalty,*" then the content-based nature of the law is obvious. Similarly, if the question is phrased: "Does the state have an interest in having criminal authors pay to their victims after-acquired royalties that discuss the crime *while not trying to reach any other after-acquired asset of the criminal,*" then the First Amendment violation becomes clear.

If the Second Circuit's approach were correct, then the rule requiring that a compelling state interest must be shown before a content based distinction can be upheld disappears entirely. For example, this Court in *Arkansas Writers' Project* examined a state law which placed a tax on general circulation publications but exempted religious, professional, trade and sports magazines. If the question were only: "Should general circulation magazines pay a sales tax," the answer is obviously, "yes." But if the question becomes: "Should general circulation magazines pay a sales tax *while sports and religious magazines do not pay such a tax*," then the answer is different.

Similarly, in *Boos v. Barry*, 485 U.S. 312, this Court examined a federal law that prohibited picketing within 500 feet of an embassy when the demonstration *criticized* the foreign government involved, but allowed such demonstrations if the picketing was favorable. Once again, if the focus were only on banning *all* demonstrations in front of an embassy, a case could be made that international relations required such a restriction. But if

one compares the types of demonstrations that are allowed and those that are prohibited, the content-based distinction becomes apparent and the law was properly invalidated.

The point of these cases is that the compelling state interest test cannot be so easily evaded. The approach of the Second Circuit undercuts any attempt to deal with content-based laws. By focusing only on the justification for the restraint on the person who is covered by the law, and paying no attention to the speech that is allowed or the other persons left free to speak, all content-based prohibitions disappear. Only by such a radical attack on basic First Amendment principles can the Son-of-Sam Law be upheld.

Finally, the factual assertions on which the Second Circuit rested its new "compelling state interest" analysis are demonstrably untrue. Thus, the court asserted that "§632-a deals with readily identifiable, locatable funds that are *commonly* available to those who victimize others," 916 F.2d at 784 (emphasis added). But, as *amici* pointed out above, there are at least 50,000 crime victims a year from felonies alone in New York State, yet the Son-of-Sam Law has been invoked less than ten times in the twelve years it has been in existence. Moreover, the Crime Victims Board has attached, or sought to attach, assets from only about seven or eight criminal authors. To talk about such funds as "commonly available to those who victimize others" is absurd.

Ultimately, the Second Circuit's conclusion depends upon the premise that there are thousands of criminals who commit crimes only so that they can write a book about how they felt while they were committing their crimes. Such a surmise is simply untenable. It assumes that there are greedy publishers whose chief goal is to make money from a criminal gloating over his deeds and that the ghoulish public will readily buy such material. The experience in New York State both before and after

the law was passed shows that no such program exists. Since, under the strict scrutiny test, it is the state's burden to demonstrate by real evidence and not by speculation and conjecture that criminals "commonly" have and exploit this asset, its failure to present any evidence to support any part of this hypothesis is fatal to its defense of the law.

If New York were genuinely interested in compensating crime victims, it could to so in a variety of ways that would undoubtedly survive constitutional review. Instead, New York has enacted a statute that focuses exclusively on expressive activity without providing the overwhelming majority of crime victims with any meaningful chance for restitution. That imbalance dooms this statute under the First Amendment. It does not and should not doom future efforts to compensate crime victims in New York or elsewhere.

CONCLUSION

For the foregoing reasons, the decision below must be reversed and New York Executive Law §632-a must be declared unconstitutional.

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